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EX PARTE OR LATE FILED

February 17, 2000

Via hand delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

Re: CC Docket No. 00-4

Dear Ms. Salas:

On February 17, 2000, Thomas Koutsky, Christopher Goodpastor, and Jason Oxman met with Jessica Rosenworcel, Jon Reel, John Stanley, William Agee, Audrey Wright, Claudia Fox, William Dever, Daniel Shiman, and Jake Jennings of the Common Carrier Bureau Policy Division to discuss SBC's Texas 271 application. Covad discussed its operations in Texas, as well as the fact that SBC's application was not complete as filed. Covad also discussed problems with SBC's performance metrics as filed with its application.

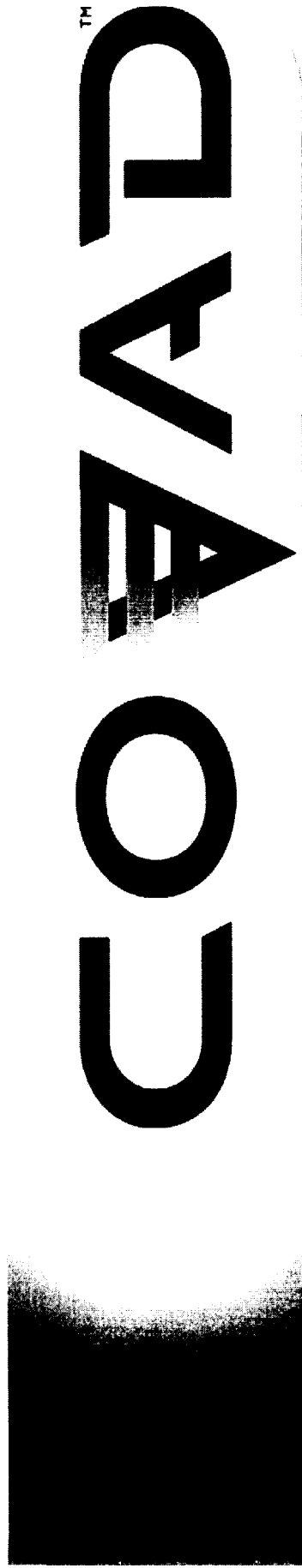
Very truly yours,

Florence Grasso

Cc: Jessica Rosenworcel
Jon Reel
John Stanley
William Agee
Audrey Wright
Claudia Fox
William Dever
Daniel Shiman
Jake Jennings
Cecilia Stephens

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Texas 271
February 17, 2000
CC Docket No. 00-4

Covad in Texas

Operational since August 2, 1999

- Houston (1 million households, 123k small businesses)
- Dallas (720k households, 91k small businesses)
- Fort Worth (355k households, 33k small businesses)
- Austin (335k households, 37k small businesses)
- Recently launched San Antonio

TOTAL: >2.4 million HH, >280k small businesses

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Summary of Covad Comments

Checklist Item (ii)

- Current DSL Loop OSS is discriminatory (Covad Brief at 4-14)
- Interim Pricing on *all* DSL loops (unlike BA-NY) (15-18)

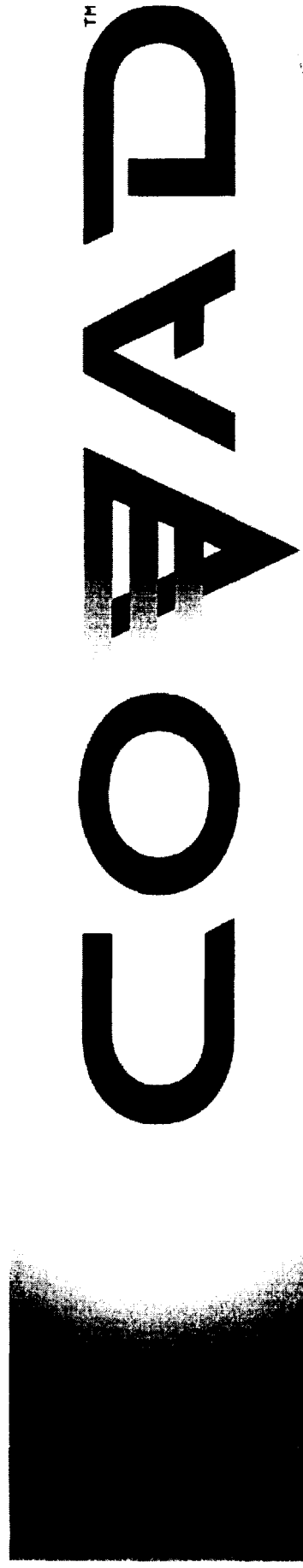
Checklist Item (iv): Unbundled Loops

- Performance Data: “fundamentally flawed” and shows discrimination (25-43)
 - SWBT performance metric data only a subset of DSL orders
 - SWBT data still shows lack of parity to SWBT retail for DSL-relevant metrics
 - Covad internal data shows poor (and getting worse) performance
- Telcordia “test” clearly inadequate (44-48)
- Separate Affiliate Not Operational (52-58)
- SWBT not deserve “unique circumstances”: it has intentionally delayed Covad and data CLEC entry (58-62)

Application was Not Compete-as-Filed

- Since application filed SBC has filed *2000 pages* to correct or supplement the record
- Application did not explain or compile Nov 99 performance data--although data in SBC's possession on 12/20
- Timing of SBC *Ex Parte* Filings Highly Suspect
 - Jan. 31: Party Comments on Application Due
 - Feb. 1: SBC puts in ostensibly “corrected” DSL performance data, places blame on processing error
 - Feb. 7: Another revision to DSL performance metrics

The January 10 Application is Incomplete and Flawed and therefore should be dismissed, like the First Ameritech Michigan Order



Measuring SWBT DSL Loop Performance

SWBT Reports Simply Inaccurate

- **Orders Placed (5-17, FOC Metric)**
 - Ignores 2/3 Covad Orders
 - SWBT admitted to DOJ that this metric, designed in Aug 99 “did not contemplate DSL” (DOJ at 14)
 - Despite the fact that by Aug 99, three FCC Orders specifically required unbundling of DSL loops!
- **DSL Loop Installation Report (55.1): SWBT tracks only 51.14% of Covad’s DSL loops**

(SWBT filed on Feb. 1 “revision” of data; Covad carrier-specific report (attached to Wall Decl.) seemingly not affected by revision)
- **SWBT’s actual performance inadequate**

FOCs: Covad brief at 28, Table 1
Installation: Covad brief at 29-31
- **SWBT not track maintenance/repair of DSL loops**

More SWBT Number Problems

- Trouble Report Rate, BRI ISDN (65-03, Jan. 14)
 - Nov 99: CLEC loops have 3x trouble report rate than SWBT retail
 - Performance worsening in Nov 99 results
 - November results statistically significant (increased 68%) ignored by Dysart
- Loop FOCs-Manual (5-17, Jan. 14)
 - Not in parity 5 of last 6 months
 - More than 2/3 of Covad orders excluded
 - Worsening over time
 - Dysart explanations limited to “one-time” events not applicable in November

Covad/SWBT Reconciled Data

- 74% of Covad's DSL loop orders initially rejected by SWBT and had to be "supplemented"
- Average interval between SWBT's receipt of LSR for SDSL orders and promised FOC was 23.6 business days
- Average interval between SWBT's receipt of LSR for ADSL orders and promised FOC date was 24.3 business days

Source:

- Covad Brief at 32-33, Michael Smith Decl. at paras. 23-33 and attachments
- Data collected at request of TX PUC, reconciled between Covad and SWBT
- Texas PUC not make any findings about this data, no continuing effort to interpret and reconcile (unlike New York)

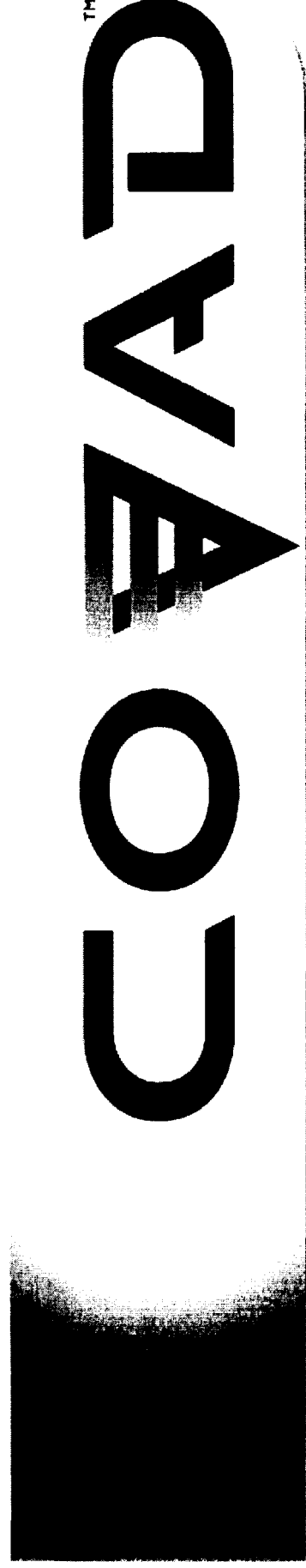
Covad Internal Measurements

- FOC Returns (Covad Brief at 35, Table 2)
 - Performance worsening as Covad's orders increase
 - Dec 1999
 - Covad received FOC within 24 hours only 11.47% of the time
 - For >40% of Covad orders, took more than five days to receive FOC
- Delivery of Late or Faulty Loops (Covad at 36-38)
 - Apx. 1/3 of loops fail "Cross-Connect" test
 - Apx. 1/4 of loops are non-functional when Covad attempts installation

Summary: SWBT DSL Loop Performance

- SWBT numbers skewed and incomplete
- Lack of Acceptance Testing for all Texas loops makes Installation Performance Difficult to Measure
- Yet, both Covad internal and SWBT data show that SWBT getting worse as Covad and other DSL CLEC orders ramp

Has SWBT really shown that they can provide DSL loops (both BRIs and DSL) at commercial volumes and nondiscriminatory basis?



DOJ Evaluation of DSL Loop Performance

SWBT is Simply Not Ready

- SBC has “not demonstrated that it is providing non-discriminatory treatment to competitors offering xDSL services” (DOJ at 2)
- Texas is “not fully and irreversibly open to competition by carriers seeking to offer advanced services using unbundled xDSL-capable loops” (DOJ at 10)

“SBC cannot satisfy either requirement” of the New York Order for xDSL-capable loops (11)

DOJ: “Fundamentally Flawed” DSL PMs

- Loop Qualification: SWBT submits data is faulty, Covad’s actual experience much worse (DOJ at 13)
- FOC (PM 5, 6): SWBT admits that no DSL loops included (DOJ at 14, DOJ Ex. 3); actual data CLEC experience much worse
- DSL Loop Installation (PM 55.1) (DOJ at 15-17)
 - SWBT admits “processing error” that excluded several data CLECs
 - Data CLECs cannot reconcile numbers, as no “corrected individual reports generated
 - Lack of Acceptance Testing “cloud[s]” this metric

DOJ on Flaws of PMs 5, 6, 55.1, 57, 62

“[T]hose deficiencies *substantially undermine* SBC’s claim to have provided nondiscriminatory access to DSL loops, since the deficient performance data relate to several *competitively important dimensions* of SBC’s DSL performance.”

“We are concerned, moreover, that those deficiencies *may be symptomatic of more serious problems* in the reliability of SBC’s performance measurement systems and processes.”

DOJ Eval. at 17

DOJ: Even SWBT's Own Data Shows Discrimination

- PM 58 (SWBT-caused missed due dates)
 - 12.1% missed due dates for CLECs in 12/99, compared to 6.3% missed for SWBT retail (DOJ at 18)
 - “*especially troubling* because the number of missed due dates has *steadily increased* over the last three months as the number of CLEC orders has increased”
- Evidence of Discrimination...
 - PM 60 (Due Dates Missed due to facilities)
 - PM 62 (Average delay days)
 - PM 55.1 (DSL Loop Installation Interval)
 - PM 59 (Trouble reports)
 - PM 65 (Trouble report rate, DSL and BRI)
 - PM 56 (BRI Loop Installs)
 - PM 58 (BRI Loop Missed Due dates)
 - PM 59 (Percent Install Trouble Reports)
 - PM 67 (Mean time to Restore)

Data CLECs “seriously disadvantaged”

“Taken as a whole, these performance reports show a service environment in which CLECs attempting to compete against SBC’s retail DSL services are *seriously disadvantaged* at present by SBC’s *inadequate wholesale performance*, and may well *face greater disadvantages in the future* if SBC’s performance continues to decline in the face of higher volumes of CLEC orders.”

DOJ Eval. at 23

Texas Performance Remedy Plan

- The performance plan “is intended to prevent *backsliding* in performance, and should not be relied upon as a bootstrap mechanism to pull poor performance into apparent compliance.” (DOJ at n. 67)
- Caps appear to be insufficient for DSL Measurements: “DSL performance measures associated with the CLECs’ interconnection agreement have yet to be defined” (Id.)

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**Structural
Separation**



Structural Separation: Not Soup Yet

- SWBT Interconnection Agreement with Affiliate (ASI) not contain detail on...
 - Line sharing arrangements (see recent TX filing)
 - Rates paid for physical/virtual collocation
 - Terms of joint marketing and personnel utilization
 - Equipment transfers and acquisitions (Project Pronto)
- ASI not operational until end of February
- Since ISDN, T1 and Frame Relay not in Affiliate, SWBT incentive to discriminate on ISDN and SDSL orders remains

Impossible to determine if ASI is being treated same as other CLECs

Covad Suggestions for Affiliate Track

- Fully Operational in fact--not in rhetoric
- Separate shareholder bases
- Affiliate must be sole retail outlet for DSL, ISDN, T1, frame, and hi-cap services
- No joint marketing
- No sharing of personnel
- Affiliate must obtain physical collocation
- No sunset
- Utilize all of the same interfaces as CLECs
- Comprehensive Interconnection Agreement

DOJ on Separate Affiliate

Requirements for “Affiliate Track”

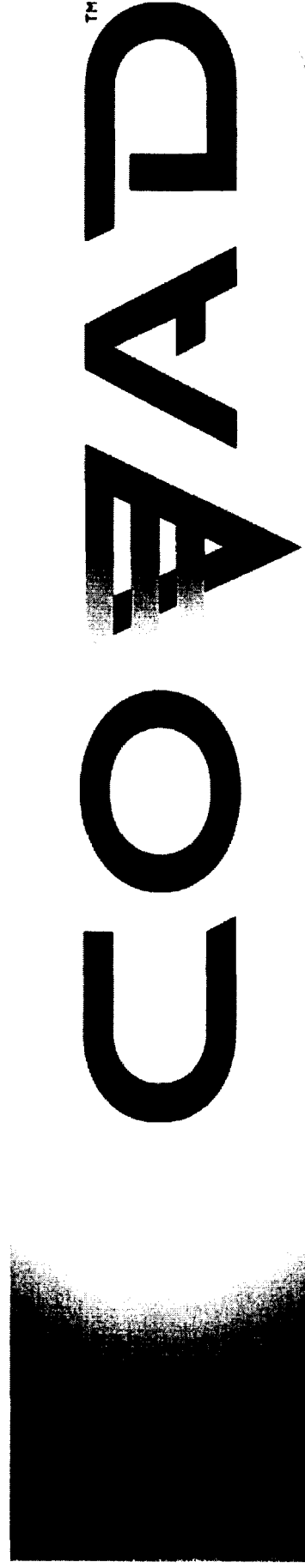
- Rigorous examination of relationship between BOC and affiliate “to ensure that the affiliate’s relationship to the BOC *is the same in all relevant respects*” as the BOC-CLEC relationship (DOJ at 25)
- Need “adequate mechanisms to detect, punish and deter any discrimination that may occur” (DOJ at 25)
 - Thus, performance measures still play a role
 - Without such a mechanism, “SBC could blatantly discriminate” in favor of affiliate
- Affiliate must be “fully operational” and “meaningful, reliable and reproducible performance measures” must be in place (DOJ at 26)

DOJ: Affiliate Not a Panacea

- “[I]t would be quite unrealistic to expect a BOC and its affiliate to be unmindful of their mutual economic interests” (DOJ at 26)
- “A *concrete demonstration* of nondiscrimination, rather than an abstract promise, will provide much greater assurance that the separate affiliate structure is in fact sufficient to prevent discrimination” (DOJ at 26)
- “A *separate affiliate does nothing to alter any underlying incentive to discriminate. At best, a separate affiliate may make it more difficult to effectuate some forms of discrimination, and make it easier to detect discrimination.*” DOJ at n. 70.

Separate Affiliate Track Not Met

- ASI not “fully operational” (DOJ at 26)
- SBC “has not demonstrated that it has actually provided nondiscriminatory performance” (DOJ at 26)
- SBC has not “explained why the separate affiliate structure should be expected to remedy the documented current performance problems (DOJ at 26)
- “[T]he current discrimination [faced by data CLECs] could be ended *only by improving the quality of performance provided to the CLECs.*” (DOJ at 26-27). Transferring SWBT retail operations to an affiliate does not solve this issue.



**“Unique
Circumstances”?:
SWBT’s Unclean
Hands**

SWBT has Delayed Covad's Entry

- May 1998: Covad requests TX agreement; negotiations go nowhere
- July 1998: SWBT tries to keep Covad out of TX 271 process
- December 1998: Covad files for arbitration and files discovery
- January 1999: SWBT attorney orders destruction of DSL documents
- April 14, 1999: Original arbitration hearing; substantial and pervasive SWBT discovery abuses uncovered
- April-June 1999: Additional discovery in arbitration
- May 1999: TX Commission orders SWBT to enter into Interim Interconnection Agreement with Covad and ACI
- June 1999: Arbitration re-hearing
- July 1999: TX Commission sanctions SWBT for conduct in Covad/ACI arbitration; SWBT eventually fined apx \$850,000
- August 2, 1999: Covad launches in Dallas, Ft. Worth, Houston, Austin
- November 1999: FCC Orders SWBT to dismantle SFS loop qualification system
- November 1999: TX ALJs issue Arbitration Order, finding for Covad and ACI on all significant counts
- December 1999: SWBT appeals Arbitration Order

THE INTERNET AS IT SHOULD BE

COVAD

Meanwhile... Actual Discrimination!

Texas Arbitration Award (Goodpastor Decl., Ex. 5)

- “Evidence in this proceeding shows that SWBT has already shared with its Retail ADSL Core Team members a listing of central offices in which CLECs have collocated or those in which CLECs are seeking deployment. The Arbitrators believe such disclosure of competitive information to SWBT retail ADSL employees is inappropriate, disadvantages competitors and must stop immediately.” Award at 68-69.
- “It is clear from evidence in this case, however, that some SWBT employees involved with retail ADSL have access to databases containing useful loop makeup information that are not available to CLECs.” Award at 61.
- “Evidence shows that SWBT’s ADSL Retail Core Team personnel have had access to network assignment databases that could easily allow SWBT’s operations to gain significant advantage over their competitors.” Award at 70.

No “Unique Circumstances”...

- DSL loops are not a “new thing”
 - August 1996 Local Competition Order orders access to DSL loops
 - August 1998 and March 1999 Advanced Services Orders reaffirm access to DSL loops
 - September 1999 UNE Remand Order clarifies ILEC obligations even further
 - New York 271 Order told SWBT what to do
- Extent of DSL Entry in Texas to date is SWBT’s making
 - Covad/Rhythms could not participate in Telcordia review because of SWBT’s sanctionable conduct in Covad/ACI Arbitration